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Attorneys for Plaintiff Mrs. Fields Franchising, LLC

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MRS. FIELDS FRANCHISING, LLC,
a Delaware limited liability company,

Plaintiff,

vs.

BEKTROM FOODS, INC.,
a North Dakota corporation,

Defendant.

COMPLAINT

Case No. _____

Judge _____

Plaintiff Mrs. Fields Franchising, LLC (“MFF”), by and through its counsel of record, Rod N. Andreason and Kirton McConkie, hereby files this complaint against Bektrom Foods, Inc. (“Bektrom”) and alleges as follows:

INTRODUCTION

1. This is an action for breach of a licensing contract. Pursuant to the parties’ Merchandising License Agreement dated May 1, 2011 (the “License Agreement”), MFF granted

Bektrom a license to manufacture, sell and distribute certain products using the “Mrs. Fields” trademark. In exchange, Bektrom agreed to pay MFF royalties on all such sales, including a minimum of \$920,000 in guaranteed payments according to a contractually specified schedule. Bektrom paid just a small portion of the guaranteed payments and defaulted on the remainder of its payment obligations, causing MFF to terminate the license. By this action, MFF seeks payment of the \$754,488 in guaranteed payments, plus contractually mandated interest.

PARTIES

2. MFF is a limited liability company organized under the laws of the State of Delaware with its principal place of business at 8001 Arista Place, Suite 600, Broomfield, Colorado 80021. At the time of the License Agreement, MFF had its principal place of business in Salt Lake City, Utah. MFF’s member is a citizen of Delaware and Colorado.

3. Bektrom is a North Dakota corporation with its principal place of business at 317 West Front Street, Monroe, Michigan 48161.

JURISDICTION AND VENUE

4. This Court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332 because the amount in controversy exceeds the sum of \$75,000, exclusive of interests and costs, and is between citizens of different States.

5. The Court has personal jurisdiction over Bektrom since it has consented to *in personam* jurisdiction pursuant to Section 41 of the License Agreement, which provides that: “any legal action, suit or proceeding arising out of or in any way in connection with this Agreement may be instituted or brought in the United States District Court for the District of

Utah. Licensee [Bektrom] and Licensor [MFF] hereby irrevocably consent and submit to, for themselves and in respect of their property, generally and unconditionally, the jurisdiction of such Court, and to all proceedings in such Court.” In addition, the Court has *in personam* jurisdiction over Bektrom pursuant to Utah’s Nonresident Jurisdiction Act, Utah Code § 78B-3-201 *et seq.* because Bektrom transacted business within this state and because Bektrom caused injury within this state. By contracting with a corporation headquartered in Utah, Bektrom engaged in minimum contacts involving the State of Utah to make the exercise of jurisdiction foreseeable and fair in this Court.

6. Venue is proper in this District pursuant to Section 41 of the License Agreement, which – as noted above – provides that the parties may bring any action before this Court and consent to the Court’s jurisdiction.” Additionally, venue is proper in this Court under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to the claims herein occurred in this District and/or 28 U.S.C. § 1391(b)(3) because the Court has personal jurisdiction over Bektrom.

FACTUAL ALLEGATIONS

7. Mrs. Fields was founded in 1977 and is one of the most recognizable cookie brands in the world. MFF owns the rights to the “Mrs. Fields” trademark and licenses those rights to allow other parties to manufacture, sell, and distribute products using the “Mrs. Fields” trademark.

8. On May 11, 2011, MFF and Bektrom entered into the License Agreement pursuant to which Bektrom was permitted to manufacture, sell, and/or distribute spice shakers,

spice grinders, dry baking mixes, pancake mixes, biscuit mix, and brownies and baking mixes under the trademarked Mrs. Fields brand.

9. Under the License Agreement, Bektrom was required – among other things – to pay MFF a royalty of (a) five percent (5%) of the Net Sales (as defined in the License Agreement) of all baking mixes and gift sets shipped and (b) eight percent (8%) of the Net Sales of all spice shakers and grinders shipped (collectively, the “Royalties”) within 30 days of the end of each quarter. (License Agreement, §§ 8, 20.3).

10. The License Agreement also required Bektrom to pay MFF a minimum of \$920,000 in guaranteed payments (the “Guarantee”) according to a fixed schedule of yearly installments:

- a. \$100,000 by September 30, 2012 (inclusive of a \$75,000 advance);
- b. \$150,000 by September 30, 2013;
- c. \$200,000 by September 30, 2014;
- d. \$220,000 by September 30, 2015; and
- e. \$250,000 by September 30, 2016.

(License Agreement, § 10). The Guarantee would be applied against any Royalties earned. *Id.*

11. If Bektrom failed to pay any required payment by its due date, then Bektrom would be obligated to pay the unpaid amounts plus annually compounded interest at the prime rate plus two percent (2%). (License Agreement, § 20.5.3).

12. From May 11, 2011 to the present date, the prime rate was three and a quarter percent (3.25 %), making the default interest rate five and a quarter percent (5.25%).

13. Bektrom paid the first \$100,000 installment on the Guarantee by September 30, 2012.

14. Bektrom failed to pay the \$150,000 Guarantee installment by September 30, 2013.

15. Instead, Bektrom paid just \$65,512, allegedly representing 5% of its Net Sales. Bektrom failed to provide the Royalty Reports, as defined by the License Agreement, backing-up this figure.

16. On August 27, 2014, Bektrom failed to cure its payment defaults (among other defaults) within three business days of receiving written notification from MFF.

17. Bektrom failed to pay the \$200,000 Guarantee installment by September 30, 2014.

18. On October 23, 2014, MFF terminated the License Agreement pursuant to Section 26.4 because of (a) Bektrom's failure to cure its defaults by August 27, 2014 and (b) failure to pay the \$200,000 Guarantee installment.

19. Pursuant to Section 27.5 of the License Agreement, "Upon expiration or early termination of this Agreement pursuant to § 26 above, all Royalty obligations, including any unpaid portions of the Advance or Guarantee, shall be accelerated and shall immediately become due and payable."

20. As of the present date, the unpaid portion of the unpaid Guarantee is \$754,488, plus interest.

COUNT I
(Breach of Contract)

21. Plaintiff restates and incorporates each of the foregoing paragraphs as if fully set forth herein.

22. MFF and Bektrom are parties to a valid, enforceable, and binding contract – the License Agreement.

23. Bektrom has breached the terms of the License Agreement by, among other things, failing to pay \$754,488, representing the unpaid portion of the Guarantee, plus contractually mandated interest at the rate of 5.25% compounded annually.

24. As a result of Bektrom's breach of contract, Plaintiff has suffered damages caused by the loss of the Guarantee of \$754,488, plus the contractually mandated interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment against Defendant as follows:

1. For an award of damages of at least \$754,488 plus interest; and
2. For such other and further relief as to this Court seems just and equitable.

DATED this 24th day of October, 2014.

Respectfully submitted,

KIRTON MCCONKIE

By: /s/ Rod N. Andreason
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Franchising, LLC

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